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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11	TRIPHINA LESLEY,	)	Case No. ED CV 15-01696 DDP (DTBx)
12	Plaintiff,	)	
13	v.	)	<b>ORDER DENYING DEFENDANT'S MOTION</b>
14	BANK OF AMERICA, N.A.,	)	<b>TO DISMISS SECOND AMENDED</b>
15	Defendant.	)	<b>COMPLAINT</b>
16		)	
		)	[Dkt. No. 39]

Presently before the Court is Defendant Bank of America, N.A.'s ("BANA") Motion to Dismiss Plaintiff's Second Amended Complaint. (Dkt. No. 39.) Based on the parties' submissions, the Court adopts the following Order.

**I. BACKGROUND**

The Court's prior two Orders on previous Motions to Dismiss detail the essential facts of this case. (See Dkt. Nos. 21, 31.) In summary, BANA began foreclosure on Plaintiff's home on February 13, 2013. Previously, Plaintiff had defaulted on her mortgage with BANA in 2011, then allegedly entered into a "Permanent Loan Modification Agreement" with BANA in 2012; Plaintiff also defaulted on this modified loan in 2012. (See Order, Dkt. No. 31.) Then,

1 Plaintiff declared bankruptcy in 2012, discharging her personal  
2 debt. (Id.)

3 According to Plaintiff's Second Amended Complaint ("SAC"), the  
4 following new facts are pleaded in response to the Court's prior  
5 Order, which dismissed a cause of action under California Civil  
6 Code § 2923.6 (dual tracking) for failure to state a claim. The  
7 SAC adds:

8 28. In or around January of 2013, Plaintiff requested that  
9 she be reviewed for a loan modification when she  
10 submitted a complete loan modification agreement. To  
11 this end, Plaintiff prepared and submitted a complete  
12 loan modification agreement. In 2013, Plaintiff had  
13 a material change in the borrower's financial  
14 circumstances since the date she entered submitted  
15 [sic] a previous modification application in 2011, for  
16 since that time, Plaintiff had filed for bankruptcy in  
2012, resulting in a discharge of vast amount of  
financial debt by the end of 2012. However,  
Defendant[] responded [b]y placing Plaintiff's loan  
modification application in review. To date,  
Defendant[] ha[s] not made a written determination  
that the Plaintiff is not eligible for a first lien  
loan modification, and as such, [is] in violation of  
California Civil Code section 2923.6.

17 29. Plaintiff's complete loan modification application  
18 included a Hardship Letter, Income Sources, Recent  
19 Taxes, Recent Utility Bill, Recent 2 years of business  
& Personal Taxes, 4506T Form, Home Owners Insurance,  
Property Tax Bill, and Recent Mortgage Statements.

20 30. On January 21, 2013, Plaintiff sent a letter to Bank  
21 of America with the following contained within that  
letter:

22 "This letter is to provide a short explanation  
23 of personal issues surrounding becoming behind  
24 in the mortgage payments. I am a single mother  
25 and after my divorce, I was still responsible  
26 for extensive drowning credit card, loans,  
27 increase in gas/fuel prices and misc. debt. I  
28 attempted to pay the debt along with the  
mortgage, which became a continued failure. My  
savings were depleted due to necessary home  
plumbing repairs, high dollar cost medications  
for my son, and other misc. expenses that exceed  
my incoming income. Reluctantly, I was forced  
to file for a bankruptcy to free myself of this

1 continued debt. When the bankruptcy was filed,  
2 I was also told that I had to return my vehicle  
3 as it was part of the bankruptcy. This vehicle  
4 was my only means of transportation to and from  
5 work a total of (120 mile commute daily), which  
6 also cause an unforeseen hardship. This left me  
7 with no options but to purchase a car cash,  
8 whereas public transportation was not an option.  
9 Without having cash on hand I was unable to  
10 purchase a car outright, and I was not able to  
11 due to the active bankruptcy filing. This  
12 forced me to have to rent a car, with rental  
13 fees for some peak months approx. \$1400 until  
14 the bankruptcy was discharged. This also  
15 created a barrier for me to stay current with  
16 the mortgage payments. With the freedom of the  
17 mentioned debt, I am now able to focus on paying  
18 an affordable mortgage. I attempted to apply  
19 for the 'California Save you[r] Home Program,'  
20 for assistance, but did [not] meet the  
21 guidelines based on the bankruptcy."

12 One of the many intentions of this letter was to  
13 put Bank of America on notice of the material change  
14 of financial condition following Plaintiff's  
15 bankruptcy. After her bankruptcy she no longer has  
16 the hardships and burdens described in her letter.  
17 Since then she has been married and has an additional  
18 income in her family. This information was  
19 communicated to BANA on multiple phone calls and to  
20 multiple individuals because Plaintiff did not have a  
21 single point of contact.

17 SAC ¶¶ 28-30. Plaintiff's SAC also alleges causes of action under  
18 California Civil Code section 2923.7 (failure to provide a single  
19 point of contact), declaratory relief based on these underlying  
20 claims, and unfair competition (UCL) based on these underlying  
21 claims.

22 BANA has now filed a Motion to Dismiss, arguing that all four  
23 causes of action fail to state a claim as alleged despite the new  
24 allegations alleged for the dual tracking cause of action and the  
25 Court's prior Order finding the other three causes of action  
26 sufficiently pleaded.

27 ///

1   **II.   LEGAL STANDARD**

2           A 12(b)(6) motion to dismiss requires a court to determine the  
3   sufficiency of the plaintiff's complaint and whether it contains a  
4   "short and plain statement of the claim showing that the pleader is  
5   entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule  
6   12(b)(6), a court must (1) construe the complaint in the light most  
7   favorable to the plaintiff, and (2) accept all well-pleaded factual  
8   allegations as true, as well as all reasonable inferences to be  
9   drawn from them. See Sprewell v. Golden State Warriors, 266 F.3d  
10   979, 988 (9th Cir. 2001), amended on denial of reh'g, 275 F.3d 1187  
11   (9th Cir. 2001); Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir.  
12   1998).

13           In order to survive a 12(b)(6) motion to dismiss, the  
14   complaint must "contain sufficient factual matter, accepted as  
15   true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (quoting Bell Atl.  
16   Corp. v. Twombly, 550 U.S. 544, 570 (2007)). However,  
17   "[t]hreadbare recitals of the elements of a cause of action,  
18   supported by mere conclusory statements, do not suffice." Id. at  
19   678. Dismissal is proper if the complaint "lacks a cognizable  
20   legal theory or sufficient facts to support a cognizable legal  
21   theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097,  
22   1104 (9th Cir. 2008); see also Twombly, 550 U.S. at 561-63  
23   (dismissal for failure to state a claim does not require the  
24   appearance, beyond a doubt, that the plaintiff can prove "no set of  
25   facts" in support of its claim that would entitle it to relief).  
26   

27           A complaint does not suffice "if it tenders 'naked  
28   assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 556

1 U.S. at 678 (quoting Twombly, 550 U.S. at 556). "A claim has  
2 facial plausibility when the plaintiff pleads factual content that  
3 allows the court to draw the reasonable inference that the  
4 defendant is liable for the misconduct alleged." Id. The Court  
5 need not accept as true "legal conclusions merely because they are  
6 cast in the form of factual allegations." Warren v. Fox Family  
7 Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

### 8 **III. DISCUSSION**

#### 9 **A. Violation of California Civil Code § 2923.6**

10 Under California Civil Code section 2923.6, because Plaintiff  
11 defaulted on a previous loan modification, Plaintiff is not  
12 guaranteed a review of later loan modification applications without  
13 "dual tracking," or the lender seeking concurrent foreclosure. See  
14 Cal. Civ. Code § 2923.6(c)(3), (g). However, subsection (g)  
15 provides a narrow exception where a borrower can obtain the  
16 benefits of the statutory prohibition on dual tracking even if the  
17 borrower has defaulted on a first loan modification – the borrower  
18 must document and submit to the mortgage servicer evidence of a  
19 material change in the borrower's financial circumstances since the  
20 previous application. Id.

21 The Court previously dismissed this cause of action with leave  
22 to amend, stating "absent some showing of material change in  
23 Plaintiff's financial circumstances since the previous application  
24 [the 2011 application that she subsequently defaulted on],  
25 Plaintiff does not have a cause of action under this section."  
26 (Order, Dkt. No. 31, at 5 (relying on Cal. Civ. Code § 2923.6(g)).)  
27 The Court stated that "what is missing in Plaintiff's FAC is an  
28 allegation that this bankruptcy actually caused a financial change,

1 an explanation of what that change is, and (most importantly) that  
2 this change was documented and sent to BANA with Plaintiff's  
3 completed loan application." (Id.) The Court noted two  
4 deficiencies: (1) what kind of documentation was provided to BANA  
5 of Plaintiff's materially changed financial situation; and (2) when  
6 Plaintiff applied for the loan modification. (Id. at 6.)

7 Now, as quoted above, Plaintiff's SAC fixes those deficiencies  
8 sufficiently for surviving a motion to dismiss, where all the well-  
9 pleaded allegations in the complaint are taken as true. Plaintiff  
10 now states that she submitted the completed loan modification  
11 agreement "[i]n or around January of 2013" and that she sent a  
12 letter to BANA with an explanation of her changed financial  
13 circumstances on January 21, 2013. (SAC ¶¶ 28, 30.) This January  
14 21, 2013 date puts the second loan modification application due to  
15 materially changed financial circumstances after the 2013 HBOR  
16 enactment and before the February 2013 foreclosure process  
17 initiated. Taking these facts in the light most favorable to  
18 Plaintiff (as is required at the pleading stage), Plaintiff has  
19 satisfactorily pleaded that she sent BANA a completed loan  
20 modification application at the right time.

21 Plaintiff has also pleaded sufficient facts to show that she  
22 sent BANA a letter explaining a material change in her financial  
23 circumstances since her previous 2011 loan modification  
24 application. (Id. ¶¶ 29-30.) Plaintiff included the letter, her  
25 income sources, taxes, bills, insurance, and other documents with  
26 her second loan modification application. Her letter explained her  
27 problems that made her unable to pay the mortgage, her bankruptcy  
28 that discharged the debt that was causing those problems, and her

1 ability to pay the mortgage now that the bankruptcy was over.  
2 Plaintiff further alleges that she informed BANA over the phone  
3 that she gained additional income through her new marriage.

4 Plaintiff's allegations are sufficient at the pleading stage  
5 to state a claim because Plaintiff's letter explained the positive  
6 change in her financial status and was supported by additional  
7 documentation. See Rosenfeld v. Nationstar Mortgage, LLC, No.  
8 2:13-cv-04830-CAS-CWx, 2014 WL 457920, at \*4 (C.D. Cal. Feb. 3,  
9 2014) (holding that a plaintiff's letter regarding elimination of  
10 credit card debt along with complete loan modification application  
11 was sufficient to overcome a motion to dismiss); cf. Ware v.  
12 Bayview Loan Servs., No. 13-CV-1310 JLS (NLS), 2013 WL 6247236, at  
13 \*5-6 (S.D. Cal. Oct. 29, 2013) (finding a "barebones" letter  
14 without details or supporting documentation, which stated that the  
15 "borrowers' financial circumstances have materially changed as  
16 their income and expenses have changed since they last submitted an  
17 application . . . . the borrowers' routine expenses have increased  
18 which is a material change of circumstance," was insufficient to  
19 survive motion to dismiss). Therefore, the Motion to Dismiss is  
20 denied as to this cause of action.

21 **B. Violation of California Civil Code § 2923.7**

22 The Court previously held that Plaintiff stated a claim as to  
23 BANA's actions post-January 1, 2013 in regards to Plaintiff lacking  
24 a single point of contact at BANA in dealing with her attempts to  
25 modify her loan. (Order, Dkt. No. 31, at 7-8 (citing Pennermon v.  
26 Wells Fargo Bank, N.A., 47 F. Supp. 3d 982, 999-1000 (N.D. Cal.  
27 2014).) Defendant repeats its arguments as to this cause of action  
28

1 in this Motion. (Mot. Dismiss at 11-13.) Therefore, the Motion to  
2 Dismiss is denied as to this cause of action.

3 **C. Declaratory Relief and UCL Violation**

4 The Court previously determined that these causes of action  
5 could go forward based on the underlying controversy regarding a  
6 violation of section 2923.7; now, the declaratory relief cause of  
7 action can go forward based on section 2923.6 as well.

8 For the UCL claim, Defendant argues that Plaintiff lacks  
9 standing to bring this claim, citing Jenkins v. JP Morgan Chase  
10 Bank, N.A., 216 Cal. App. 4th 497, 523 (2013) overruled on other  
11 grounds, Yvanova v. New Century Mortgage, 62 Cal. 4th 919, 199 Cal.  
12 Rptr. 3d 66, 79 (2016). Jenkins involved a plaintiff who had not  
13 yet lost her home to foreclosure, and who had not alleged any  
14 unlawful, unfair, or fraudulent conduct by the defendant that  
15 occurred before her default, making the foreclosure lawful and not  
16 caused by the acts alleged to be in violation of the UCL. Id.

17 Here, Plaintiff alleges that the failure to consider her  
18 complete loan modification application in January 2013 before the  
19 foreclosure initiated in February 2013 was unlawful – a violation  
20 of the UCL – and caused her harm: the now-pending foreclosure sale.  
21 Therefore, while it would be proper to put Plaintiff in foreclosure  
22 proceedings after her default in 2012, her completed loan  
23 modification application and changed financial circumstances in  
24 January 2013 made such foreclosure allegedly unlawful without first  
25 responding to the application. Therefore, the holding in Jenkins  
26 does not suggest to this Court that Plaintiff lacks standing to  
27 assert a UCL claim.



1 The Motion to Dismiss is denied as to both of these causes of  
2 action with the underlying controversies based on both California  
3 Civil Code section 2923.6 and 2923.7.

4 **IV. CONCLUSION**

5 For all the reasons discussed above, the Court DENIES  
6 Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint.

7  
8 IT IS SO ORDERED.

9  
10  
11 Dated: March 28, 2016



DEAN D. PREGERSON  
United States District Judge